Filed 10/20/04 P. v. Vasquez CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. IVAN VASQUEZ et al., Defendants and Appellants.	D041726 (Super. Ct. No. SCD166690)

APPEALS from judgments of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

Appellants Ivan Vasquez and Alberto A. Renteria appeal from judgments sentencing them to prison for terms, respectively, of 19 years and 17 years, imposed after a jury found each of them guilty of two counts of assault with a deadly weapon or with force likely to cause great bodily injury, in violation of Penal Code section 245,

subdivision (a)(1).[1] They contend the judgments must be reversed due to juror misconduct. Renteria also contends there is no substantial evidence in support of the jury's verdicts finding him guilty of the assaults. For reasons explained in this opinion, we affirm the judgments.

I

FACTUAL AND PROCEDURAL SUMMARY

On the afternoon of April 4, 2002, five to seven members of the Lomas Street gang attacked three young men in Golden Hills Park after one of them identified himself as a member of the Sherman gang, a rival group. Victim Fernando G.[2] was stabbed in the back, kicked and stomped upon by three or four of the attackers. One of the attackers attempted to stab victim Marco I., and another tried to hit Marco with balled fists, but he was uninjured. Marco's brother Fernando I. managed to run away.

Vasquez and Renteria were charged with assault with a deadly weapon and instrument of force likely to produce great bodily injury in violation of section 245, subdivision (a)(1) against Marco in count 1 and against Fernando G. in count 2. Both Vasquez and Renteria were alleged to have personally used a deadly weapon (§ 1192.7, subd. (c)(23)). Both were also alleged to have committed the offense for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)). The information also alleged that Vasquez had previously been convicted of attempted

---

1 All further statutory references are to the Penal Code unless otherwise specified.

murder, a prior conviction within the meaning of sections 667.5, subdivision (b), 668, 667, subdivision (a)(1), 1192.7, subdivision (c), 667, subdivisions (b) through (i), and 1170.12. Finally, the information alleged that Renteria had previously been convicted of robbery within the meaning of sections 667, subdivision (a)(1), 668, 1192.7, subdivision (c), 667, subdivisions (b) through (i), and section 1170.12.

The defense was that the prosecution evidence was not sufficient to prove Vasquez and Renteria were part of the group that attacked the victims. The identification evidence was conflicting. Fernando G. was unable to identify either defendant from photos shown to him by the police. At trial, he identified Vasquez and Renteria as being among those who attacked him. He testified that neither Vasquez nor Renteria was the person who stabbed him, although either could have been the stabber. He testified that he identified Vasquez and Renteria because of the photos shown to him by police. He was relying on the police to arrest the right people. The defense and the prosecution stipulated that Fernando G. told personnel at Mercy Hospital that he had used marijuana laced with cocaine on the day of the crimes.

Marco testified that all of the attackers were armed with knives. He identified Renteria on the day of the crime and in court as the person who took a stab at him. He told police that the person who tried to hit him with a balled-up fist was wearing a blue T-shirt and glasses. Vasquez was wearing a blue shirt at the time of his arrest. He wore

---

2 The record does not reveal the ages of the victims, but the information identified them by the initial of their last names, suggesting they may have been minors at the time of the crimes. We continue to use this form of reference to protect their privacy.

glasses in court. Marco testified that when he spoke with an investigator, he deliberately switched the identifications around. At trial he was firm in his conviction that he could identify his attackers.

Fernando I. testified that most of the attackers were armed with knives. He identified Vasquez on the day of the crime as one of the attackers. He did not identify Renteria on the day of the crime, and could not identify either Vasquez or Renteria in court.

Oscar Rodriguez, who lives across the street from Golden Hills Park, saw the fight from his house. On the day of the crime, he identified Vasquez as the person who ran past his apartment with a knife in his hand after the attack. He did not identify Renteria on the day of the crime. At trial he was a reluctant witness, claiming not to remember anything about the incident. Rodriguez claimed he was intoxicated when he spoke with police and could not remember anything he said to the police.[3] He did not identify Vasquez or Renteria at trial.

A woman who lived in the neighborhood, Angeles Villegas, was walking though an alley, pushing her child's stroller on her way home from the laundromat on the day of the attack, when Renteria ran toward her. When he saw the police coming, he said, "I'm with you. I'm with you." She said, "No, you're not." Police Officer Michael Wintz saw

---

[3] Detective Ray Valentin, who spoke with Rodriguez, detected no symptom of intoxication. He testified at trial that it did not appear Rodriquez had had anything to drink.

Renteria run into the alley and speak with the woman. He detained Renteria for possible identification, and arrested him when he was identified by Marco.

As Police Officer Erroll McCrea was en route to the scene, he saw Vasquez walking swiftly and breathing heavily. When detained, Vasquez was nervous and initially gave police a false name. After the police were unable to find anyone by that name in their system, he said his name was Ivan Vasquez. McCrea noticed Vasquez had a Lomas tattoo on his arm.

Several police officers testified that Vasquez and Renteria were known members of the Lomas Street gang. Detective Greg Pinarelli, who testified as an gang expert for the prosecution, testified that Renteria and Vasquez are among the 42 members of the Lomas Street gang. He opined that the crime committed in this case benefited the Lomas Street gang by enhancing its reputation for violence with other gangs and in the community.

Thomas R. MacSpeiden, Ph.D., called by the defense, testified concerning the factors that affect the accuracy or inaccuracy of eyewitness identification.

After both sides rested, the court granted defense motions for judgment of acquittal (§ 1118.1) as to the allegations that Vasquez and Renteria personally used a deadly weapon against victim Fernando G.

The jury found Vasquez and Renteria guilty of assault with a deadly weapon or with force likely to cause great bodily injury as charged in counts 1 and 2. It also found that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1). The

jury was unable to reach a verdict on the allegation that Renteria personally used a deadly or dangerous weapon against Marco as alleged in count 1. Therefore, the court declared a mistrial as to that matter, and the prosecutor's motion to dismiss the allegation was granted.

Vasquez admitted that he was convicted of attempted murder in June 1997, that he served a separate prison term for that conviction within the past five years, and that the crime was a serious felony within the meaning of the Three Strikes law. Renteria admitted that he was convicted of robbery in January 1998 within the meaning of the Three Strikes law.

The court sentenced Vasquez to prison for a term of 19 years, consisting of a midterm (three years) doubled, plus two 5-year enhancements (§§ 186.22, subd.(b)(1), 667 subd. (a)(1)) on count 1, and a consecutive two-year sentence (one-third the midterm) plus a one-year enhancement (§ 186.22, subd. (b)(1)) on count 2.

The court sentenced Renteria to prison for a term of 17 years, consisting of a midterm (three years) doubled, plus one 3-year enhancement (§ 186.22, subd.(b)(1)) plus one 5-year enhancement (§ 667, subd. (a)(1)) on count 1, and a consecutive two-year sentence (one-third the midterm) plus a one-year enhancement (§ 186.22, subd. (b)(1)) on count 2.

II

THE NEW TRIAL MOTION BASED ON JUROR MISCONDUCT

Vasquez and Renteria moved for a new trial on the ground of juror misconduct. Their motions were supported by the written statements of two jurors who declared, in

relevant part, that during deliberations the foreman said that if Vasquez and Renteria were at the park and did not try to stop the attack, they were guilty.[4]

---

[4] Juror No. 2 declared, under penalty of perjury: "1. I was Juror Number 2 in the trial of Ivan Vasquez and Alberto Renteria. [¶] 2. I did not believe there was any evidence that either defendant committed the act of stabbing anyone in the park. The jury felt that the defendants were at the park. [¶] 3. The Presiding Juror, Number 5, was a control freak. He wanted to read the instructions to us. He would not give the jury instructions to us to read. He said that they were there and they could have stopped the incident and did not therefore they were guilty. He even controlled the buttons for the bailiff. [¶] [4]. The Presiding Juror was rude to Juror Number 7. Juror Number 7 finally put her foot down and got the instructions. Juror Number 7 was the Indian woman in the front row. [¶] [5]. There seemed to be an overall attitude that because they were in a gang they were guilty. [¶] [6]. The trial went long and the Jurors were in a hurry. There was some pressure to reach a verdict. We called for a readback and we cancelled it because it would take too much time. [¶] [7]. We should not have settled any of it. I feel they are not guilty and feel I should have stood my ground. I felt like we had done the wrong thing immediately. I stayed with Juror Number 1 and spoke to some people from Mr. Cox's office and told them about the lack of evidence at that time. [¶] [8]. I was convinced to find them guilty even though there was no evidence they had done anything because they were there and did not stop it. This is what Juror Number 5 declared the law to be."

Juror No. 1 declared under penalty of perjury: "1. I was Juror Number 1 in the trial of Vasquez and Renteria, SCD 166690. [¶] 2. I felt that there was no credible evidence that either of these defendants were guilty of stabbing [Fernando G., known as] Giant or Fernandez [*sic*]. [¶] 3. I believe they were there, however, in all the testimonies that were presented, no one could identify Vasquez nor Renteria as one of the guys who stabbed Giant. In my opinion the Fernandez [*sic*] brothers were lying on the stand so I could not figure out who actually took a stab at him (one of the Fernandez [*sic*] brothers) so I ignored there [*sic*] testimonies. [¶] 4. When I heard [prosecutor] Mr. Runyon's closing argument about aiding and abetting and that if these men were there they were guilty according to the law. [¶] 5. I believed Renteria was at the park because of the girl with the baby carriage. I believed Vasquez was at the park because of the witness across the street. I believe that his in court testimony was explainable because he was scared. [¶] 6. During the deliberations the foreman kept control of the jury instructions and read them to us. He read the Aiding and Abetting instruction to us. He said that if they were at the park and did not try to stop the attack, they were guilty. He finally allowed Juror Number 7 to read the instructions. [¶] 7. After the trial two other Jurors and I returned to the jury lobby and spoke to another juror that had many trials under her belt. We were upset by what had just happened and explained that we did not think they had done

The trial court ruled this evidence inadmissible under Evidence Code section 1150, and denied the motion for new trial without taking evidence. Vasquez and Renteria contend the court erred in denying the new trial motion. Vasquez argues the jurors' declarations should have been considered because they described overt acts of misconduct rather than the reasoning process by which the foreman reached his conclusion. Renteria joins in this argument and adds that the misconduct undermined the structural integrity of the trial.

Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

Cases involving the statement of a juror during deliberations require a careful application of the rule of Evidence Code section 1150. If the statement injects into the deliberations evidence or law obtained from a source other than in court, the statement is an admissible overt act of misconduct. (See, e.g., *In re Stankewitz* (1985) 40 Cal.3d 391 [juror made misstatement of law based on his experience as a police officer]; *People v.*

---

anything but the law said we had to convict. She said that the reason they need juries was in cases like this. That is if it did not seem right the jury could acquit. Since then I have been upset with what we did."

Honeycutt (1977) 20 Cal.3d 150 [juror consulted attorney re questions of law involved in the case].) If, on the other hand, the juror's statement reflects his or her deliberative process based upon the law as instructed by the court and evidence received in court, the statement is not admissible to impeach the verdict. (See *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677 [jurors' misdefinition of battery was deliberative error in the collective mental process].) This distinction implements the policy favoring the "'free exchange of ideas during the jury's deliberations.'" (*People v. Cox* (1991) 53 Cal.3d 618, 700, citing *People v. Elkins* (1981) 123 Cal.App.3d 632, 638.)

One example of the distinction is found in *People v. Steele* (2002) 27 Cal.4th 1230, where the California Supreme Court held that Evidence Code section 1150 renders inadmissible the declaration of jurors that they would not have voted for the death penalty had they believed the court's instruction concerning life without the possibility of parole. The *Steele* court explained: "'[E]vidence that the jurors misunderstood the judge's instructions, were influenced by an improper remark of a fellow juror, assented under an erroneous belief that the judge would use clemency or had the legal right to vary the sentence, or had been influenced by inadmissible evidence is simply of no legal significance. [Citation.] In short, under both the common law and Evidence Code section 1150, the jurors' motives, beliefs, misunderstandings, intentions, and the like are immaterial.'" (*Id.* at p. 1264.)

An opposite example is found in *In re Stankewitz*, *supra*, 40 Cal.3d 391. There, two jurors declared that another of the jurors "advised the other jurors that he had been a police officer for over 20 years; that as a police officer he knew the law; that the law

provides a robbery takes place as soon as a person forcibly takes personal property from another person, whether or not he intends to keep it; and that as soon as petitioner took the wallets at gunpoint . . . he committed robbery, whether or not he intended to keep them." (*Id.* at p. 396.) The California Supreme Court reversed the judgment, explaining in relevant part: "When extraneous law enters a jury room — i.e., a statement of law not given to the jury in the instructions of the court — the defendant is denied his constitutional right to a fair trial unless the People can prove that no actual prejudice resulted." (*Id.* at p. 397.) The juror "violated the court's instructions and 'consulted' his own outside experience as a police officer on a question of law. Worse, the legal advice he gave himself was totally wrong. Had he merely kept his erroneous advice to himself, his conduct might be the type of subjective reasoning that is immaterial for purposes of impeaching a verdict. But he did not keep his erroneous advice to himself; rather, vouching for its correctness on the strength of his long service as a police officer, he stated it again and again to his fellow jurors and thus committed overt misconduct." (*Id.* at pp. 399-400.)

Here, as in *Stankewitz*, the juror did not keep his misunderstanding of the law to himself. And here, as in *People v. Honeycutt*, *supra*, 20 Cal.3d 150, 158, the misunderstanding of the law was that of the foreman, "whose perceptions and conclusions may often sway other jurors." But there is no indication that the foreman's misunderstanding of the law was based upon his own experience or expertise. Nor was there any evidence that his misunderstanding was obtained from an source extraneous to the judicial process. Instead, the declarations offered in support of the motion for new

trial demonstrated merely that at one point in the deliberations the foreman stated the law as he misunderstood it based upon the instructions given by the trial court.[5] It is reasonable to assume that this misunderstanding was corrected by reference to the copy of written instructions present in the jury room. In other words, the statement attributed to the foreman reflected his subjective mental processes during deliberations. The subjective nature of that process is not changed simply because other jurors heard, remembered and reported the foreman's verbalization of his reasoning. (*People v. Elkins*, *supra*, 123 Cal.App.3d 632, 638.) As this court observed in *Mesecher v. County of San Diego, supra,* 9 Cal.App.4th at page 1684: "Here, the juror's statements themselves did not constitute misconduct, nor do they reflect an outside influence brought into the courtroom. Rather, the alleged misconduct arose from the way in which the jury interpreted and applied the instructions. Such evidence is inadmissible."

Accordingly, we hold the trial court did not err in refusing to consider the declarations of Juror No. 1 and Juror No. 2 in ruling on the motion for new trial. It necessarily follows that the order denying the motion on the ground that no juror misconduct had been proved was proper. In light of this conclusion, we need not reach Renteria's contention that juror misconduct undermined the structural integrity of the trial.

---

5 We note that the trial court instructed the jury that: "[M]ere presence does not amount to aiding and abetting. And mere knowledge that a crime is being committed and the failure to prevent the commission of that crime does not by itself amount to aiding and abetting."

III

THE SUFFICIENCY OF THE EVIDENCE

Renteria contends the evidence was insufficient to prove he assaulted either Fernando G. or Marco. He asserts that he was found guilty only because of the foreman's misconduct, as demonstrated by the fact that the jury was unable to agree that he was the person who attempted to stab Marco.

We review this contention under the substantial evidence rule, resolving issues of credibility and drawing all reasonable inferences in support of the jury's verdicts. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1011.) So viewed, the evidence we have previously summarized proved that Renteria, who was identified by Marco as a participant in the attack, and who attempted to avoid contact with the police by claiming he was with Villegas as she pushed her child's stroller through an alley, participated in the attacks on the victims for the purpose of enhancing his gang's reputation for violence. This evidence is sufficient to support the jury's implied findings that Renteria aided and abetted the assaults on Fernando G. and Marco.

DISPOSITION

For the foregoing reasons, the judgments are affirmed.

IRION, J.

WE CONCUR:

O'ROURKE, Acting P. J.

AARON, J.